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No. _____

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1997

Roger Roots, *Petitioner*,

v.

United States of America, *Respondent.*

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether 26 U.S.C. Sec. 5861(d), a statute that imposes up to 10 years in federal prison for mere intra-state possession of property which lacks a $5 tax stamp, represents a penal enactment beyond Congress' power to tax under the Constitution.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

ROGER ROOTS, *Petitioner,*
v.
UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT
OF APPEALS FOR THE TENTH CIRCUIT

Roger Roots respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is unreported. The opinion of the district court is unreported.

JURISDICTION

The court of appeals entered its judgment on August 14, 1997 and its order denying rehearing on September 16, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. Sec. 2255 provides that persons in the custody of the United States may move to vacate, set aside, or correct an unconstitutional sentence.

STATEMENT

The Petitioner, Roger Roots (hereafter, Roots), pro se, is a United States Citizen, and a student at Roger Williams University School of Law in Bristol, Rhode Island. In February of 1990, Roots was a 22-year-old student of Northwest Community College in Powell, Wyoming. During a public speaking class, Roots gave a

presentation on the subject of how to build homemade firearms out of household materials. He displayed several visual aid models, including a model of a gun that had been constructed with household materials including a section of steel pipe, a chunk of wood, and a rubber band (see police sketch of the object in Appendix). The object never crossed a state line.

A Bureau of Alcohol, Tobacco and Firearms (BATF) investigation followed. Roots was found in possession of an unregistered firearm in violation of 26 U.S.C. Sec. 5861(d) after a plea of guilty. He was sentenced on January 10, 1992 to serve 20 months in federal prison and 3 years on supervised release. His court-appointed attorney filed no appeal but Roots filed this action beginning in Sept. of 1995 asserting that he was in custody in violation of the Constitution: to wit that his act of possessing the "unregistered firearm" was beyond the regulatory powers of the United States and properly within the domain reserved to the States pursuant to the 10th Amendment.

Roots cited the then-recent decision in *U.S. v. Lopez*, 514 U.S. 549 (1995) (finding that the Gun-Free School Zones Act of 1990 exceeded the powers of the United States under the Commerce Clause). Roots' jurisdictional challenge was narrowly construed by the district court as being a challenge based solely on lack of nexus with the Commerce Clause. On Aug. 6, 1996, the U.S. District Court for the District of Wyoming issued an order denying Roots relief under 28 U.S.C. Sec. 2255 upon the reasoning that appellate courts of the "Fourth, Fifth, Eighth, and Ninth Circuits have held the enactment of these statutes were a valid exercise of Congress' power to tax." Memorandum and Order, Aug. 6, 1996, page 4.

This order was erroneous with regard to at least one Circuit (the Eighth) and was silent on the growing split in the circuits over the issue of the proper constitutional foundation and interpretation of 26 U.S.C. Sec. 5861(d). Some circuits justify the statute under the Commerce Clause while others say it is an extension of the Tax Clause. However the primary error of the district court was its conclusion that the statute could be validly justified by the power

to tax, for it does not satisfy any condition of validity as a tax statute.

Roots appealed on the grounds that the federal government had no jurisdiction under either power. The District Court refused to grant a Certificate of Appealability, citing the newly-enacted Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996).

On Dec. 23, 1996 Roots petitioned The U.S. Court of Appeals for the Tenth Circuit for a certificate of appealability, arguing that the District Court had no authority to require a Certificate of Appealability (because Roots' motion had been filed before passage of the Antiterrorism and Effective Death Penalty Act of 1996), let alone to deny such a certificate, as his challenge was one of subject matter jurisdiction. A Tenth Circuit panel, Justices Anderson, Henry, and Briscoe, found that the requirement of a Certificate of Appealability was no doubt illegal, but affirmed the district court on the merits nonetheless. Reaching the merits of Roots' challenge, the Court of Appeals issued a one-sentence conclusion: "We agree with the district court that *Lopez* does not undermine the constitutionality of Sec. 5861(d) because that provision was promulgated pursuant to Congress's power to tax [citations omitted]." Order and Judgment, Aug. 14, 1997, page 5.

REASONS FOR GRANTING THE PETITION

This case illustrates the current trend of lower courts ignoring prior Supreme Court precedent in order to uphold the federal regulation of firearms within the states. In so doing, the courts below have drastically undermined Supreme Court jurisprudence over the proper exercise of the constitutional power to tax.[1] This case also highlights the state of chaos and confusion in the circuit courts regarding the source of the congressional power to enact 26 U.S.C. Sec. 5861(d). For if truly a tax statute, Sec. 5861(d) needs to be evaluated as a tax statute. The 10th Circuit actually did this in *U.S. v. Dalton*, 960 F.2d 121 (10th Cir. 1992) and found that a

---

[1] *See* "Taxing Power--Use for Ulterior Purpose," Annotation to *Sonzinsky v. U.S.*, 81 L.ed. 776-789 (a good overview of Supreme Court precedent on the issue of when a tax statute extends too far into forbidden regulatory purposes).

person cannot lawfully be prosecuted for possession of an unregistered gun that the government will not allow to be registered. This should not only apply to firearms prohibited by 18 U.S.C. Sec. 922(o), but those prohibited from registry under Chapter 53 of the Internal Revenue Code as well.

Other circuits have declined to apply the Dalton doctrine. See *U.S. v. Jones*, 976 F.2d 176 (4th Cir. 1992); *U.S. v. Ridlehuber*, 11 F.3d 516 (5th Cir. 1993); *U.S. v. Ardoin*, 19 F.3d 177 (5th Cir. 1994); (each claiming that such convictions are valid under the Tax Clause even though the firearms cannot be registered). Still others have claimed that convictions under 26 U.S.C. Sec. 5861(d) are exercises of Congress' power over interstate commerce. The Eighth Circuit, despite the erroneous assertion of the lower courts, justified Sec. 5861(d) under the Commerce Clause in *U.S. v. Pearson*, 8 F.3d 631, 633 (8th Cir. 1993). Also see *U.S. v. Hale*, 978 F.2d 1016 (8th Cir. 1992). The Sixth Circuit found the same section to be "reasonable regulation for the maintenance of public order," (presumably pursuant to the power to regulate interstate commerce). *U.S. v. Warin*, 530 F.2d 103, 108 (6th Cir. 1976).

There is little doubt from any authority that the true purpose of Sec. 5861(d) is the regulation of conduct within the states by the federal government. Revenue, which cannot be raised by the provision at all, is nothing but a stated pretext. This Court has said as much in *U.S. v. Freed*, 401 U.S. 601, 609 (1971) when it referred to the measure as a "regulatory measure in the interest of public safety."

A close reading of the modern National Firearms Act reveals why the Dalton doctrine should apply to all NFA firearms, not just machine guns. Sec. 5812, 5822. At the time of possession, it is impossible to "cure" the nonregistration of the firearm. Applications will be denied if the firearm already exists. Thus, no unregistered firearm can possibly be registered by a possessor and no tax can possibly be raised by the provision. Thus,

compliance by the possessor with the registration requirements referred to in Sec. 5861(d) is impossible.[2]

Because this case presents an important issue and was decided by the court below in a manner arguably at odds with prior decisions of the Supreme Court, the petitioner asks for certiorari. *Foucha v. Louisiana*, 499 U.S. 946 (1991).

Prior Supreme Court Precedent:

This is an issue of first impression for the Supreme Court. Although convictions for "possession of an unregistered firearm" have been reviewed by the Court twice since the statute has been in its current form (*U.S. v. Freed*, 401 U.S. 601 (1971); *Staples v. U.S.*, 511 U.S. 600 (1994)) these cases considered other issues. The need for Supreme Court consideration of 26 U.S.C. Sec. 5861(d)'s effect on federalism has been apparent for some time.

Never has the Supreme Court upheld a conviction for mere possession of personal property within a state as a valid exercise of the power to tax. To do so would overturn a great body of prior Supreme Court precedent. The National Firearms Act (of which Sec. 5861(d) is a part) was originally patterned (in 1934) after the Harrison Narcotics Act of 1914. *See* Staples v. U.S., 511 U.S. 600 at 627 (J. Stevens, dissenting) (saying that "Attorney General Cummings expressly advised Congress that the text of the gun control legislation deliberately followed the language of the Anti-Narcotic Act to reap the benefit of cases construing it."). The Supreme Court struck down convictions under *THAT* Act which attempted to use the taxing power to reach mere personal possession of narcotics. See *U.S. v. Jin Fuey Moy*, 241 U.S. 394 (1916); *Linder v. U.S.*, 268 U.S. 1 (1925) (both construing the Harrison Act to improperly exercise the power to tax when attempting to reach personal, non-commercial possession and distribution of narcotics).

While the dealer tax provision of the National Firearms Act was upheld in *Sonzinsky v. U.S.*, 300 U.S. 506 (1937), and the interstate

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[2] Roots acknowledges that he could have been charged with "making" a firearm without first registering it pursuant to Sec. 5822, if there had been sufficient evidence.

transportation prohibition was upheld in *U.S. v. Miller*, 307 U.S. 174 (1939) (although probably not under the Tax Clause[3]), the Act at that time did not contain a proscription of mere intra-state possession. Possession proscription was added in 1958 by Public Law 85-859, Sec. 203(h)(2), 72 Stat. 1428. Never has a person's mere possession of untaxed items created solely within the boundaries of a State been found by the Supreme Court to be reachable under any power of Congress through federal criminal laws.

Nature of the Power to Tax:

Article I, Sec. 8, Cl.1 of the Constitution provides that "[t]he Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises . . . ." Together, these terms comprehend all possible forms of taxation. Although Congress may use taxes to promote non-revenue objectives *within* the circle of legitimate federal concerns, it cannot police personal conduct within the states under the pretext of raising revenue. The power to tax, unlike the power over interstate commerce, does not carry with it a "regulatory" power. To be valid, a provision must actually raise revenue, and Sec. 5861(d) raises no revenue.

Revenue laws cannot be "penal laws" but must be remedial in nature. Their primary purpose must be to set a duty owed in arrears up right, and, if necessary, to prevent fraud and deter delinquency. See *U.S. v. Hodson*, 77 U.S. 937, 939 (1870). The Supreme Court has repeatedly distinguished "taxes" from penal enactments. See *Lipke v. Lederer*, 259 U.S. 557 (1922); *U.S. v. Constantine*, 296 U.S. 287 (1935); *Department of Revenue v. Kurth Ranch*, 511 U.S. 767 (1994). This has been done although such penal enactments do in fact raise some revenue. Yet in Roots' case, the penalty (confinement in federal custody for 4-1/2 years) raised no revenue

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[3] The *Miller* Court did not specify which power of Congress was exercised by the Act but concluded that "the objection that the Act usurps police power reserved to the States is plainly untenable." 307 U.S. at 178. Justice Black later cited *Miller* as precedent under the *Commerce* power. Atlanta Motel v. U.S., 379 U.S. 241, 276n. (1964).

and had no relationship to a (nonexistent) seller's transfer tax of $5.

In *Constantine* and *Kurth Ranch*, an added tax was found to be itself a penalty, so how could a prison term not be penal? "[T]he Court cannot shut its eyes to what is obviously, because designedly, an attempt to control conduct . . . merely because Congress wrapped the legislation in the verbal cellophane of a revenue measure." Frankfurter, dissenting in *U.S. v. Kahriger*, 345 U.S. 22, 38 (1953). At a minimum, the provision must be "a rational or good-faith revenue measure . . . ." Jackson, concurring, *id.* at 35. Here, the government's claimed interest in raising $5 cannot justify the placement of Roots in federal custody for 4-1/2 years under a rational basis test. The $5 tax does not require the imprisonment of mere possessors to operate; both the NFA and the Harrison Act operated perfectly as viable taxing acts for decades without the need to punish possessors of untaxed items--something that can raise no revenue for the government.

The Supreme Court has said that the provisions "must be naturally and reasonably adapted to the collection of the tax . . . ." *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 43 (1922) and must not be "plainly inappropriate and unnecessary to reasonable enforcement of a revenue measure." *Linder v. U.S.*, 268 U.S. 5, 18 (1925).

Even by the most expansive version of the "rational basis" test, the imprisonment of Roots for the (nonexistent) liability for a (nonexistent) transfer tax--which itself was not applicable to Roots--cannot be justified. Such a provision could have had absolutely no substantial relation to the raising of revenue, the end within the legitimate federal concern of the taxing power. For although tax enforcement measures may be chosen which have extraneous aims--they can only be constitutionally justified if they are rationally adapted to facilitate collection of the taxes due, and here there are no taxes due from Roots.

Even if we could allow one step farther, upon a "deterrence" theory, Sec. 5861(d) must fall. The imprisonment of Roots, a possessor, would seem to only "deter," if anyone at all, other

possessors from *possessing* an unregistered firearm. Any deterrence, even if existent at all, would seem not to weigh upon payment or nonpayment of the $5 "transfer tax."

The only published opinion that has ever tried to address this problem is that of *U.S. v. Ross*, 458 F.2d 1144,1145 (5th Cir. 1972). The Fifth Circuit openly acknowledged that proscribed possession raises no revenue, but "ultimately discourages the transferor on whom the tax is levied from transferring a firearm without paying the tax." This strained logic assumes that a transferor will pay the transfer tax out of empathy for the transferee, in fear that a transferee will go to prison for the transferor's failure to pay the tax. Such a bizarre theory tests the very definition of deterrence. Yet this is the only basis upon which Sec. 5861(d) can raise any revenue at all.

Where an alleged revenue statute prohibits acts within the states under the pretense of inducing purchases of a taxed product, and where it is found that this inducement is suspect, the statute is a "police regulation" and void under the Tenth Amendment for having no reasonable nexus with revenue--raising. *U.S. v. DeWitt*, 76 U.S. (9Wall.) 41, 44-45 (1870).

Even admitting the bona fide revenue nature of the $5 "transfer tax" itself, the attachment of validity upon every regulatory provision tacked onto it is clearly erroneous. To reach that conclusion would be to disregard the "particularity" feature of the necessary and proper clause, as surely as to conclude that any activity "affecting interstate commerce" is subject to comprehensive regulation by Congress. See *Linder*, supra, 268 U.S. at 22.

A passage in *Kahriger* suggested that the very presence of such extraneous provisions--even if the "tax" of the law in which they appear is valid--might cast doubt on the validity of the entire measure (thus showing that the so-called "tax" is not really a true tax at all). 345 U.S. at 31. The significance of this suggestion should not be disregarded. The distinction between true and sham taxes--with the presence of several provisions which have no apparent revenue purpose (and are indeed, distinctly secondary to

other, extraneous objectives)--has been painfully delineated repeatedly by this Court.

Roots' 4-1/2 years in custody were not even incidental to the operation of the excise scheme of the National Firearms Act. It was regulation for its own sake, or for the sake of some non-revenue (and hence unlawful police power) purpose. Roots had no duty, according to the statute, to pay the $5 stamp tax. The government's prosecution of him was done solely for regulatory purposes. Indeed, the statute is designed, not to gain revenues from the transfer of firearms, but to remove the firearm from existence and eliminate it completely--without raising a dime of revenue. See Sec. 5872(b): Disposal.

The opinion below represents the single most extreme extension of the constitutional power to tax in American history.

CONCLUSION

The opinion below conflicts with at least two decisions of the Supreme Court (and many others by implication), several opinions of rival circuits, and even one of the opinions cited by the panel itself for support. Roger Roots' conviction for possession of an unregistered firearm under 26 U.S.C. Sec. 5861(d) cannot be justified under the power to tax because Roots had neither the duty nor the power to pay the $5 tax, nor could the firearm itself have been registered or taxed, and the statute violates every test of validity that the Supreme Court has ever postulated. The Court should grant certiorari in this case to appropriately consider the vitally important issue herein.

Respectfully submitted,

DATED: 11/4/97
BY: /s/ Roger Roots

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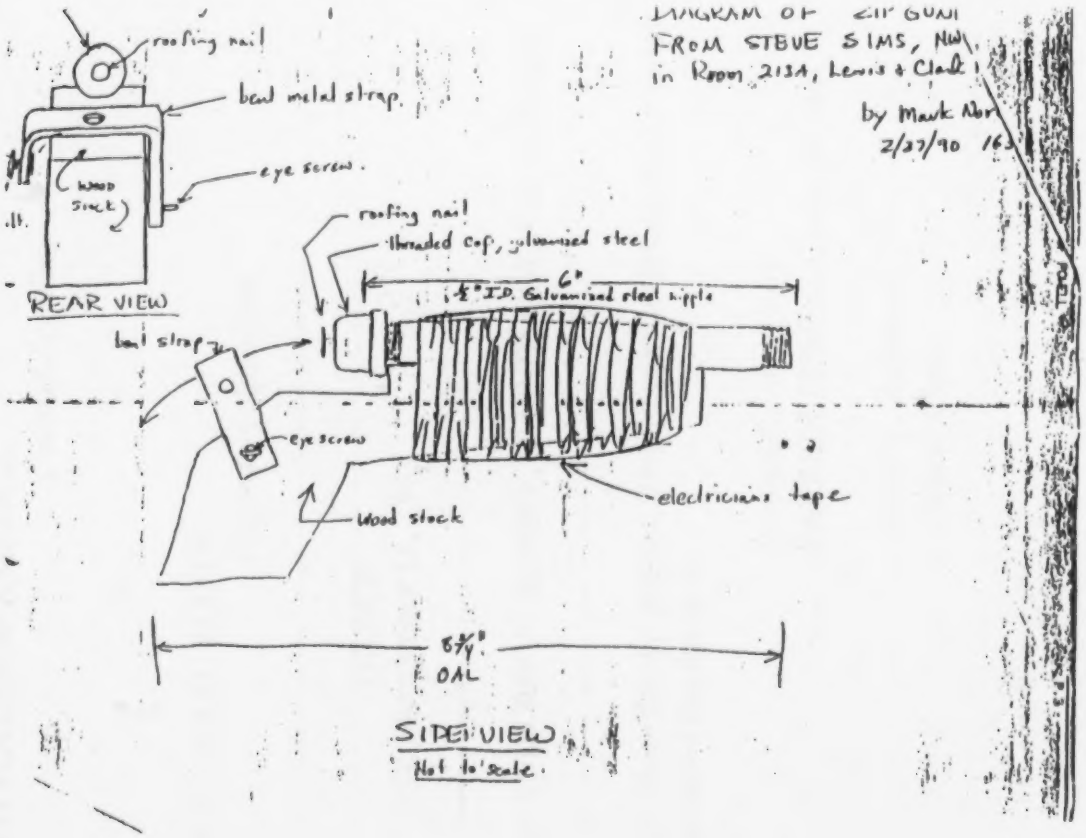
APPENDICES

APPENDICES



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UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 96-8085

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

ROGER ISAAC ROOTS,
Defendant-Appellant.

ORDER
Filed September 16, 1997

Before **ANDERSON, HENRY,** and **BRISCOE**, Circuit Judges

Roger Isaac Roots' petition for rehearing is denied by the panel that rendered the decision.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/ L. Balzanue
Deputy Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Case Nos. 96-8085
(D.C. 95CV 205-J)
(District of Wyoming)

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

ROGER ISAAC ROOTS,
Defendant-Appellant.

ORDER AND JUDGMENT*

Filed August 14, 1997

Before **ANDERSON, HENRY,** and **BRISCOE**, Circuit Judges

After examining the briefs and appellate record, this panel has unanimously determined that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(f), 1 0th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

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*This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Appellant Roger Roots, appearing pro se, requests a certificate of appealability to appeal the district court's order denying his petition for post-conviction relief under 28 U.S.C. Sec. 2255. We liberally construe Mr. Roots's pro se pleadings. See Riddle v. Mondragon, 83 F.3d 1197, 1202 (lOth Cir. 1996).

Section 102 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996) ("AEDPA") (codified at 28 U.S.C. § 2253(c)(1)(B) (Supp. 1997)), requires that a circuit justice or judge "issue[] a certificate of appealability" before an appeal may be made from the final order in a § 2255 action. Prior to the amendment, no certificate of appealability was required. Among other things the AEDPA amends §§ 2253-2255 of chapter 153 of title 28, which governs all habeas corpus proceedings in the federal courts. The AEDPA also creates a new chapter 154, for habeas proceedings against a state in a capital case.

We have held that a § 2255 movant who files an appeal after the effective date of the AEDPA is first required to obtain a certificate of appealability. See United States v. Riddick, 104 F.2d 1239, 1240 (lOth Cir. 1997) ("Applying the new certificate of appealability provisions to pending § 2255 cases in which the notice of appeal was filed after the effective date of the AEDPA does not increase [the defendant's] liability for past conduct or impose new duties with respect to completed transactions.").

Mr. Roots filed this action in September 1995, but filed his appeal in August 1996. The Supreme Court's decision in Lindh v. Murphy, No. 96-6298, 1997 WL 338568 (June 23, 1997), may be read to call our reasoning in Riddick into question. Lindh focused specifically on the applicability to pending cases of the amendments to Sec. 2254(d) of chapter 153 of title 28.

In Lindh, the Supreme Court applied the canon of construction *expression unius est exclusio alterius*, and focused on the negative implications of Sec. 107(c) of the AEDPA: "Chapter 154[,which applies to capital cases] . . . shall apply to cases pending on or after the date of enactment of this Act." 110 Stat. 1226, see 1997 WL 338568, at *5. The Court observed that because the amendments to chapter 153 do not contain an effective date,by negative implication, "the amendments to chapter 153 were assumed and meant to apply to the general run of habeas cases only when those cases had been filed after the date of the Act [April 24, 1996]." 1997 WL 338568, at *4.

Mr. Roots's case (although clearly not his notice of appeal) was filed before the Act's effective date. Regardless whether the requirements of chapter 153 apply in Sec. 2255 cases after Lindh, Mr. Roots cannot succeed on the merits. On the merits, we affirm the district court's denial of Mr. Roots's motion for post-conviction relief.

BACKGROUND

In March 1990, Mr. Roots was charged with two counts of violating 18 U.S.C. Sec. 922(g)(1)(possession of a firearm by a felon) and one count of violating 26 U.S.C. Sec. 5861(d) (possession of an unregistered firearm). In August 1991, Mr. Roots entered a guilty plea to the Sec. 5861 offense, in exchange for the government's agreement to drop the Sec. 922 charges. Mr. Roots was sentenced to 20 months imprisonment and 3 years of supervised release.

DISCUSSION

In September 1995, Mr. Roots filed a petition seeking to vacate his conviction and sentence,[1] contending that Congress lacked authority under the Commerce Clause to prohibit the possession of unregistered firearms, absent proof of some case-specific nexus to interstate commerce.[2] He subsequently filed a second challenge to his conviction, which he characterized as a petition for a writ of habeas corpus. The district court consolidated his claims, and treated them as motions for post-conviction relief under 28 U.S.C. Sec. 2255.

Mr. Roots based his arguments on United States v. Lopez, 115 S.Ct. 1624 (1995), in which the Supreme Court invalidated 18 U.S.C. Sec. 922(q), a statute that prohibited the knowing possession of a firearm in a school zone.[3] According to Mr. Roots, § 5861 is constitutionally flawed for the same reason the Court struck down § 922(q): neither provision requires proof of a nexus to commerce, nor do they regulate what reasonably could

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[1] Mr. Roots characterized his September 1995 petition as one for declaratory judgment.

[2] According to Mr. Roots' petition, the requisite nexus to commerce was lacking in this case because the firearm that was the basis for his conviction was a weapon constructed from household materials. See Rec. vol. 1 at 5. He asserts that the gun never traveled in or affected interstate commerce in any way. See id. Similarly, he claims that "few, if any of those components [of the firearm] were of a commercial or marketable nature." Id.

[3] Mr. Roots does not appear to appeal the district court's rejection of his arguments that (1) his indictment "was secured by the use of prejudicially slanted and false material in secret;" and (2) the firearm was not a "firearm" within th~ statutory definition. Rec. vol. 1, doe. 16, ex. L at 1, 3. The district court correctly determined that Mr. Roots waived these arguments by pleading guilty, by failing "to raise them on direct appeal, . . . [by] fail[ing] to demonstrate cause and prejudice sufficient to excuse his failure to raise them on direct appeal, [and by] failing to demonstrate [that] a miscarriage of justice would result absent review on the merits. Rec. vol. 1, doe. 23 at 2. Accordingly, we shall not address these claims. See Drakg v. City of Fort Collins, 927 F.2d 1156, 1159 (lOth Cir. 1991) ("Despite the liberal construction afforded pro se pleadings, the court will not construct arguments or theories for [the plaintiff] in the absence of any discussion ofthose issues.") (citing Dunn v. Whit`, 880 F.2d 1188, 1197 (lOth Cir. 1989)).

be characterized as commercial activity. See Lopez, 115 S. Ct. at 1634. Mr. Roots also claims he received ineffective assistance of counsel, because of counsel's failure to raise this argument.

We agree with the district court that Lopez does not undermine the constitutionality of § 5861(d) because that provision was promulgated pursuant to Congress's power to tax, see U.S. Const. art. I, § 8, cl. 1, not pursuant to the Commerce Clause. See United States v. Dalton, 960 F.2d 121, 124-25 (10th Cir. 1992) (acknowledging that "the registration requirements of the National Firearms Act were passed pursuant to the taxing power"); United States v. Staples, 971 F.2d 608, 609-11

(lOthCir. 1992)(citing Dalton), rev'd on other grounds, 114 S.Ct. 1793 (1993).[4] See also United States v. Copus, 93 F.3d 269, 275-76 (7th Cir. 1996) (upholding § 5861(d) as a permissible exercise of Congress's taxing power); United States v. Pearson, 8 F.3d 631, 633 (8th Cir. 1993) (same); United States v. Tous, 461 F.2d 656, 657 (9th Cir. 1972) (same).

Mr. Roots's ineffective assistance of counsel claim also fails. To prevail, Mr. Roots must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that his counsel's deficient performance was suff~ciently prejudicial that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 694 (1984). Because Mr. Roots's substantive argument regarding Congress's authority to criminalize his conduct lacks merit, it is apparent that counsel's failure to raise such arguments was neither deficient nor prejudicial to Mr. Roots.

We have considered all of Mr. Roots's arguments and have found them to be without merit. Accordingly, we affirm the district court's dismissal of Mr. Roots's motion for post-conviction relief.

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[4] In Dalton, we acknowledged that Sec. 5861 was enacted pursuant to Congress's taxing power, but struck down, on due process grounds, a conviction under that provision for possession of an unregistered machine gun because the 1986 enactment of 18 U.S.C. § 992(o) made it impossible to register machine guns. See 960 F.2d at 12425. Dalton is of no comfort to Mr. Roots, however, as he has pointed to no provision comparable to § 922(o) that would prevent the registration of the firearm which was the basis of his conviction. See United States v. Copus, 93 F.3d 269, 276 (7th Cir. 1996) (refusing to apply Dalton to invalidate a conviction for possession of silencers or the making of destructive devices); Staples, 971 F.2d at 609-11 (refusing to apply Dalton to invalidate conviction for possession of an unregistered machine gun where the machine gun could have been registered prior to the effective date of § 922(o)).

The mandate shall issue forthwith.

Entered for the Court,

Robert H. Henry
Circuit Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

ROGER ISAAC ROOTS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Docket No. 95-CV-205-J
Docket No. 95-CV-260-J

MEMORANDUM AND ORDER DENYING MOTION FOR POST-CONVICTION RELIEF PURSUANT TO 28 U.S.C. SECTION 2255; DENYING THE GOVERNMENT'S REQUEST FOR SANCTIONS

Before the court is Roger Isaac Roots' consolidated motion for post-conviction relief pursuant to 28 U.S.C. Sec. 2255 and the government's amended response thereto, which includes a request for sanctions. having considered all of the relevant facts and law, the materials submitted by the parties, and the entire file in this case, the court concludes Mr. Roots' consolidated motion should be **DENIED**, and that the government's request for sanctions should also be **DENIED**.

I.

Mr. Roots pleaded guilty to one count of possession of an unregistered firearm in violation of certain provisions of the Internal Revenue Code, namely, 26 U.S.C. Sections 5845(e), 5861(d) & 5871. *United States v. Roots*, D. Wyo. No. 90-CR-030-J, judgment of conviction entered Feb. 20, 1992. This court later sentenced Mr. Roots to twenty months imprisonment and three years supervised release. On September 13, 1995, Mr. Roots filed a document entitled "Petition for Declaratory Judgment"

challenging his conviction, which the clerk of court designated as No. 95-CV-205-J. On November 14, 1995, Mr. Roots filed a second challenge to his conviction, which he styled as a petition for a writ of habeas corpus pursuant to 28 U.S.C. Sec. 2241. The clerk of court designated this case as No. 95-CV-260-J.

On June 25, 1996, pursuant to a motion by the government, the court construed *Roots v. United States*, No. 95-CV-205-J, and *Roots v. United States*, No. 95-CV-260-J, as motions for post-conviction relief pursuant to 28 U.S.C. Se. 2255 and ordered that they be consolidated. In the same order, the court granted the government leave to file an amended, consolidated response. On June 9, 1996, Mr. Roots filed a motion for reconsideration of the court's June 25, 1996 order. The court denied Mr. Roots' motion for reconsideration on July 19, 1996.

The government filed its amended response on July 15, 1995, within the time permitted under the court's June 25, 1996, order. In its amended response, the government asks that the court deny Mr. Roots' consolidated motion and also request that the court award sanctions. Mr. Roots filed his reply to the amended response on August 5, 1996.

II

In his consolidated motion, Mr. Roots alleges his conviction and sentence should be vacated for the following reasons: (1) 26 U.S.C. §§ 5845(e), 5861(d) & 5871, are unconstitutional because Congress exceeded its authority under the commerce clause, U.S. Const. Art. 1, § 8, cl. 3, when it enacted them, in light of the Supreme Court's decision in *United States v. Lopez*, 115 S.Ct. 1624 (1995); (2) the firearm involved in his case had no nexus with interstate commerce, because "[t]he very parts, design, manufacture, and possession of the alleged firearm were all in, of, and from a single

state (Wyoming)''; (3) his indictment "was secured by the use of prejudicially slanted and false material in secret;" (4) he received inadequate assistance of counsel because his attorney did not advise him the government had the burden of proving the weapon involved in this case bore a nexus with interstate commerce; (5) the firearm was not a "firearm" within the statutory definition.

The court concludes that claims (1) and (2) lack merit. Assuming for the sake of discussion that Congress lacked authority under the commerce clause to enact 26 U.S.C. §§ 5861(d) and 5871,a very large assumption indeed, the Fourth, Fifth, Eighth, and Ninth Circuits have held the enactment of these statutes were a valid exercise of Congress' *power to tax* under U.S. Const. Art. I, § 8, cl. 1. *United States v. Aiken,* 974 F.2d 446, 448 (4th Cir.1992); *United States v. Ross,* 458 F.2d 1144, 1145 (5th Cir.), *cert. denied,* 409 U.S. 868 (1972); *United States v. Pearson, 8* F.3d 631, 633 (8th Cir. 1993), *cert. denied, ---U.S.---,* 114 S.Ct. 2132 (1994); *United States v. Alverson,* 666 F.2d 341, 347 (9th Cir. 1982); *United States v. Petrucci-;* 486 F.2d 329, 331 (9th Cir. 1973), *cert. denied,* 416 U.S. 937 (1974); *United States v. Tous;* 461 F.2d 656, 657 (9th Cir. 1972) (per curiam). Accordingly, Mr. Roots' *Lopez* argument is misplaced. Because the commerce clause was not implicated, the court also rejects claim (4), that counsel rendered inadequate assistance when he failed to advise him the government had the burden of proving the weapon involved in this case bore a nexus with interstate commerce. Simply put, such advice would have been incorrect.

The court rejects claims (3) and (5) for three reasons. First, Mr. Roots did not assert any of his five claims on direct appeal. "A § 2255 motion is not available to test the legality of a matter which should have been raised on direct appeal." *United States v. Cox,* 83 F.3d 336, 341 (10th Cir. 1996). "When a defendant fails to raise an issue on direct appeal, he is barred from

raising the issue in a § 2255 proceeding, unless he establishes either cause excusing the procedural default and prejudice resulting from the error or a fundamental miscarriage of justice if the claim is not considered." Id. Applying these standards, the court concludes claims (3) and (5) could have been raised in a direct appeal but were not and that Mr. Roots has not shown cause and prejudice sufficient to excuse his failure to do so, nor has he demonstrated a miscarriage of justice will result absent review on the merits. Second, the court concludes Mr. Roots waived claims (3) and (5) by pleading guilty. Third, the **court** concludes that even if it were to reach the merits of claims (3) and (5), they would not provide a basis for relief.

Finally, regarding the government's request for sanctions, the court agrees Mr. Roots' petition lacked merit, but does not believe it is so lacking in justification that sanctions are warranted.

III

For the reasons stated, IT IS HEREBY ORDERED that Mr. Roots' consolidated motion for post-conviction relief pursuant to 28 U.S.C. § 2255 iS DENIED. It is further

ORDERED that the United States' request for sanctions is DENIED.

DATED this 6th day of August, 1996.

/s/ Allen B. Johnson,
CHIEF UNITED STATES DISTRICT JUDGE

United States District Court

for the District of Wyoming

UNITED STATES OF AMERICA

v.

Roger Issac Roots

JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT

Case Number 90CR030-0IJ
James H. Barrett
Defendant's Attorney

THE DEFENDANT:
XX pleaded guilty to count(s) III of an indictment.
Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count No.
26:5845(e) 26:5861(d) 26:5871	Possession of unregistered firearm	III

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984. It is ordered that the defendant pay to the United States a

special assessment of $50.00, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorny for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of twenty (20) months.

The Court makes the following recommendations to the Bureau of Prisons:

Federal Correctional Institution, Yankton, South Dakota

The defendant is remanded to the custody of the United States Marshall.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of.:

three (3) years

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution

obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

Defendant shall not use or possess any firearms, ammunitions, explosive devices or dangerous weapons. Supervised release shall be revoked for possession of a firearm.
Defendant shall not use or possess any illegal drugs or controlled substances. Supervised release shall be reovked for possession of illegal drugs or controlled substances.
Defendant shall not associate in any manner with white supremacist organizations.

Defendant: Roger Issac Roots Case Number: 90CR030-OIJ

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

1) The defendant shall not commit another Federal, state or local crime;

2) the defendant shall not leave the judicial district without the permission of the court or probation officer;

3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) the defendant shall support his or her dependents and meet other family responsibilities;

6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;

8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphemalia related to such substances, except as prescribed by a physician;

9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

11) the defendant shall pemmit a probation officer to visit him or her at any time at home or elsewhere and shall pemmit confiscation of any contraband observed in plain view by the probation officer;

12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

13) the defendant shall not enter into any agreement to act as an infommer or a special agent of a law enforcement agency without the permission of the court;

14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.